NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. RAFAEL MENDOZA-LOPEZ, aka David Emendiola et al., Defendant - Appellant.	No. 02-50583 D.C. No. CR-01-00100-VAP-01 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted November 6, 2003
Pasadena, California

Before: B. FLETCHER, RYMER, and GRABER, Circuit Judges.

Defendant Rafael Mendoza-Lopez appeals from his sentence, following a guilty plea, for transporting illegal aliens, assaulting a federal officer with a dangerous weapon, and being an illegal alien found in the United States after a prior deportation and conviction. We affirm.

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*/ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

1. Defendant first argues that the district court erred by imposing a six-level enhancement under U.S.S.G. § 2L1.1(b)(4) because the court did not find that Defendant intended to use his car as a weapon to harm Officer Shine. Assuming, without deciding, that intent is required, Defendant cannot prevail because he admitted to the requisite intent.

In the plea agreement, Defendant expressly stipulated to the enhancement for "Dangerous Weapon Used" under U.S.S.G. § 2A2.2(b)(2)(B) as being an "applicable" factor. Defendant's argument is that the § 2L1.1(b)(4) enhancement should be construed as identical to the § 2A2.2(b)(2)(B) enhancement with respect to the intent element. Even if he were correct, his agreement that the latter applies necessarily means that the intent element of the former is met.

2. Defendant next argues that the court erred by imposing adjustments under both § 3C1.2 and § 3A1.2(a). The district court explained that the latter enhancement related to the assault itself and the victim's status as a government officer, while the former enhancement related to the high-speed chase that occurred after the assault, while Defendant was fleeing from the border checkpoint. These enhancements do not relate to the same conduct and therefore do not constitute impermissible double counting. See United States v. Alexander, 48 F.3d 1477, 1492 (9th Cir. 1995) (defining impermissible double counting).

3. Finally, Defendant argues that the Commentary to § 2L1.1(b)(5) precludes the district court's application of an enhancement under § 3C1.2. The court applied an enhancement under § 2L1.1(b)(5) because Defendant hid three aliens in the trunk of his car, thereby creating a substantial risk of death or serious bodily injury to them. See U.S.S.G. § 2L1.1, cmt. n.6. The same application note states that, "[i]f subsection (b)(5) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from § 3C1.2." Id. Here, however, the district court did not apply subsection (b)(5) "solely," or even partly, on the basis of conduct related to fleeing from a law enforcement officer. Defendant's endangerment of the aliens he kept in the trunk of his car was distinct from his endangerment of the public by leading law enforcement officers on a high-speed chase on a public highway.

AFFIRMED.